RECORD AND BRIEF

No. 15-577

IN THE

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,

Petitioner,

v.

SARAH PARKER PAULEY, DIRECTOR,
MISSOURI DEPARTMENT OF NATURAL RESOURCES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. Its core mission is to enhance the well-being of the Jewish people through the advancement of human rights and democratic values.

AJC believes that the First Amendment's twin guarantees of the free exercise of religion and the separation of church and state work together to ensure that Americans of all faiths and of no faith can live as their consciences dictate. Respecting these constitutional mandates is also the surest way of avoiding entrenched religious divisions in our pluralistic society.

While there is a long and honorable history of taxpayer funds being used to support faith-based institutions in their provision of secular social services, any such funding must be accompanied, in AJC's view, by adequate church-state safeguards. Among other things, this means that public grants or contracts should not be used to fund "pervasively religious organizations" whose religious mission is inextricably intertwined with the provision of services.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner's blanket consent to the filing of *amicus* briefs is on file with the Clerk. Respondent has consented to the filing of this brief.

Nevertheless, when these concerns are not present—that is, where the program or activity at issue is inherently secular in nature and would be perceived by the public as such—AJC believes that religious organizations should be entitled, as a matter of federal constitutional law, to apply for government funding on the same terms as secular organizations.

SUMMARY OF THE ARGUMENT

The "room . . . between the two Religion Clauses," as the Court described it in *Locke v. Davey*, 540 U.S. 712, 725 (2004), sometimes permits a state to give its own anti-establishment interests greater weight than the minimum required by the federal Establishment Clause. But, as *Locke* emphasized, this principle is at other times limited by the Free Exercise Clause, among other provisions of the Federal Constitution. *See id.* at 718; *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

As in *Widmar*, the Court need not decide exactly how far Missouri may go in enforcing the stringent anti-establishment provisions of its constitution. *See Widmar*, 454 U.S. at 275-76. It is enough to recognize that the funding offered by Missouri for rubberized playground surfaces, even if it were to benefit a church-owned playground, could not reasonably be understood by the public as promoting a religious purpose, subsidizing the operational expenses of a house of worship, or otherwise involving the State in a matter outside the secular sphere.

As a result, the only potential anti-establishment concern in the context of this case is that a church, rather than some other organization, has applied for funding from the State. Denial of a religious organization's grant application solely because it is a

religious organization—not because the funding would advance or might appear to advance the organization's religious mission—promotes no valid anti-establishment policy or principle. Rather, it disadvantages the organization solely because it is a religious organization. The Free Exercise Clause does not permit that result.

In its very earliest case on the Establishment Clause, *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15-18 (1947), the Court recognized the tension involved when the government provides public funds and services to or for the benefit of religious organizations. *See also Mitchell v. Helms*, 530 U.S. 793, 868, 874-75 (2000) (Souter, J., dissenting). But the grant program at issue here is thoroughly secular, and thus this case falls squarely on the Free Exercise side of the line.

ARGUMENT

I. DISQUALIFICATION OF AN APPLICANT FROM A STATE GRANT PROGRAM THAT FUNDS A FACIALLY NON-RELIGIOUS FUNCTION OR ACTIVITY, SOLELY BECAUSE THE APPLICANT IS A CHURCH, IS NOT PERMISSIBLE.

The only stated reason why Trinity Lutheran was denied funding for its playground—and apparently, the only reason in fact—is that its playground is owned by a church. All parties agree that the federal Establishment Clause would not be violated by funding this playground. Where a fundamentally religious function or program is involved, it may be permissible for the government to discriminate on the basis that the recipient of funding is a religious group, even absent a full-blown Establishment Clause

violation. But in this case, both the State's program and the church's proposed use of the funding are far removed from the realm of religious practice. The State's anti-establishment inclinations must yield to the church's right to equal participation in public life, and to receive public funding on equal footing with secular institutions.

A. Religious Organizations Provide Significant Benefits to the Public, Often Supplementing or Replacing Governmental Activities.

As this Court has recognized, there exists a "long history of cooperation and interdependency between governments and charitable or religious organizations." *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988). This tradition reflects the vital role that religious organizations play within the social-services sphere.[2] Indeed, Congress has acknowledged religious groups' unique capacity to address "problem[s] that [have] complex and moral and social dimensions"[3] that government agencies would be hard-pressed to confront on their own. The notion that "nonprofit

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[2] More than half of all congregations and many other religious organizations within the United States deliver human services to their communities. U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Faith-Based Organizations In Community Development*, at i (2001), *available at* www.huduser.gov/portal/publications/faithbased.pdf [hereinafter *Faith-Based Organizations*].

[3] S. Rep. No. 97-161, at 15-16 (1981). This report relates to Adolescent Family Life Act programs, which dealt with problems of adolescent pregnancy through the partial involvement of religious organizations. The committee stated that "promoting the involvement of religious organizations in the solution to these problems is neither inappropriate nor illegal."

religious organizations have a role to play in the provision of services"[4] is a recognition that these organizations have become an integral part of the social safety net[5] and perform services that the government might otherwise provide.[6] *See Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 697 (1970) (Harlan, J., concurring) (recognizing religious groups' "doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government").

Religious organizations provide a wide range of services that reflect their diverse natures. Examples include refugee resettlement,[7] adoption and foster

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[4] *Id.*

[5] Nearly 430,000 religious congregations exist within the United States, "represent[ing] over 20 percent of all identifiable nonprofit organizations in the country, and over one-quarter of the public-serving, or charitable, type of organizations." Lester M. Salamon, *America's Nonprofit Sector: A Primer*, 231–32 (3d ed. 2012).

[6] In fiscal 2006, 65 federally funded social-service programs were terminated, and an additional 63 saw their funding reduced. Part of the justification for the reduction in funding was that religious organizations would fill the gap in service. Kenneth Scott Smith & Martell Teasley, *Social Work Research on Faith-Based Programs: A Movement Towards Evidence-Based Practice*, 28 J. of Religion & Spirituality in Social Work: Social Thought 306, 307 (2009).

[7] From 2008 to 2013, more than 60,000 ethnic Nepalese refugees were resettled within the United States by several religious groups, including "the Hebrew Immigrant Aid Society, United States Conference of Catholic Bishops, Church World Service, World Relief, Lutheran Immigration and Refugee Service, and Episcopal Migration Ministries." The Aspen Institute, *Principled Pluralism: Report of the Inclusive America Project*, 33 (2013), *available at* www.aspeninstitute.org/sites/default/files/content/docs/jsp/Principled-Pluralism.pdf.

care,[8] homelessness,[9] activity centers for children,[10] and the construction of housing for low-income families.[11] This is true in Missouri as well as in the rest of the country.

B. A State's Anti-Establishment Interests, Though Generally Valid and Worthy of Respect, Must Yield When the State Provides Grants for an Apparently Secular Purpose.

This case presents an as-applied challenge to Trinity Lutheran's exclusion from Missouri's tire-grant program. The church does not seek to invalidate Missouri's anti-establishment constitutional provision in its entirety, nor is it necessary for the Court to determine the precise boundaries of the State's right to rely on its anti-establishment interests, extending beyond the requirements of the federal Establishment Clause, in the operation of its programs. The question, rather, is whether a state's otherwise valid anti-establishment policies may be given the weight that Missouri has given them here—*i.e.*, relying on them to deny funding for a project that does not itself present any First Amendment concerns, and thus to

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[8] Catholic Charities of the Archdiocese of St. Louis runs a foster-care home within the greater St. Louis area. *See* www.ccstl.org.

[9] Watered Gardens is a Christian community homeless shelter run in Joplin, Missouri. *See* www.wateredgardens.org.

[10] A group of Baptist fellowships formed a partnership in East St. Louis to create an activity center for children. *See* www.cacesl.org.

[11] Habitat for Humanity, a well-known and large international organization, is a Christian housing ministry, addressing the issues of poverty housing throughout the world. *See Faith-Based Organizations* at 11-12.

disadvantage religious institutions for no reason other than the fact that they are religious.

1. The government may decline to provide funding to religious organizations for religious purposes or otherwise to become excessively entangled with religious practices.

Many of the Court's religion cases have involved situations in which federal, state, or local governments have chosen to provide public funding that benefits religious schools and organizations or their constituents. *See, e.g., Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocational funding for student attending Bible college); *Agostini v. Felton*, 521 U.S. 203 (1997) (public-school teachers providing remedial education in parochial schools); *Mitchell* (federal funding for educational materials and equipment in sectarian schools); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers that may be used at religious schools).

Missouri's constitution includes a provision that, at a general level, diverges from the orientation of the governments involved in the cases discussed just above. The framers of the State's constitution expressed a strong desire that the State not provide public funding to churches and other religious institutions. This anti-establishment orientation, imposing special restrictions on aid to religious institutions beyond those applicable to comparable secular institutions, is not inherently illegitimate. As the Court held in *Locke*, there are circumstances in which a state may elect not to provide funding even though the federal Establishment Cause presents no obstacle. *Compare Witters*, 474 U.S. at 489 (holding that Establishment Clause does not prohibit

Washington from providing vocational funding to student at religious college) *with Locke*, 540 U.S. at 718-19 (holding that Free Exercise Clause does not require Washington to provide scholarship funds to student pursuing theology degree in preparation for service in clergy).

2. The "play in the joints" identified in the Court's religion cases does not allow the government unfettered discretion in all matters involving funding or other benefits provided to religious organizations.

The Court has identified "'play in the joints'" between the two Religion Clauses. *Locke*, 540 U.S. at 718 (quoting *Walz*, 397 U.S. at 669). Scholarships for students pursuing devotional theology degrees fall within this area of flexibility; one state may choose to provide them without violating the Establishment Clause, but another state may decline to offer them without violating the Free Exercise Clause. *See id.* at 719, 725.

Nevertheless, the joints of the Religion Clauses have only a limited range of motion. A state's discretion to provide or decline funding to or in support of religious organizations must be considered in context, with particular attention to the purpose or effect of the program or activity to be funded. The Establishment Clause places limits on the ability of the government to advance the free exercise of religion—for example, by favoring one sect over another in the allocation of public funds. *See, e.g., Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 840 (1995) (stating that a tax "for the direct support of a church or group of churches ... would run contrary to Establishment Clause concerns dating from the

earliest days of the Republic"); *Everson*, 330 U.S. at 15 (among other things, government cannot "prefer one religion over another"). Similarly, government cannot offer incentives for parents to choose a religious education over a secular one. *See Zelman*, 536 U.S. at 653.

A government that seeks to avoid favoring religion is constrained by the Free Exercise Clause in just how far it may extend its anti-establishment philosophy. For example, in *Widmar*, a case that also involved the Missouri constitution, the Court stated that the State's interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause" was "limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." 454 U.S. 263, 276 (1981). *See also McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (invalidating state statute barring ministers from serving as delegates to constitutional convention); *Mitchell*, 530 U.S. at 835 n.19 (plurality opinion) (stating that "exclusion of religious schools" from federal-state aid program "would raise serious questions under the Free Exercise Clause"). And even the dissenters in *Mitchell* agreed that the withholding from religious groups of public benefits, "extended in modern times to virtually every member of the population and valuable to every person and association," is impermissible. *Mitchell*, 530 U.S. at 874 (Souter, J., dissenting). Such denials, Justice Souter wrote, "could be said to 'hamper' religious exercise indirectly." *Id.* And no one suggests that a local government could deny basic public services, such as police and fire protection, to churches and other religious organizations. *See Everson*, 330 U.S. at 17-18.

3. The Free Exercise Clause governs when a state's only valid anti-establishment concern is that an applicant for governmental funding is a religious institution.

In particular circumstances, a state might point to a number of different factors that could support a decision, in furtherance of its anti-establishment policies, to refuse to provide funding to, or for the benefit of, a religious organization. Examples might include the following:

- Funds would be used for the education of future members of the clergy, as in *Locke*, or as salaries for current clergy;
- The program to be funded, if conducted by a religious organization, would constitute proselytizing or religious education;
- A grant relating to real property could be used to construct a house of worship, or to shift the expenses of its maintenance or operation from adherents to taxpayers;
- A grant recipient could use government funding to express a religious message that a reasonable observer might attribute to the government;
- Funds intended for a secular purpose might be diverted to religious activities;[12] or

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[12] The plurality in *Mitchell* rejected the mere possibility of diversion of funding as a relevant factor in an Establishment Clause analysis. *See Mitchell*, 530 U.S. at 820. Other justices disagreed. *See id.* at 902-03 (Souter, J., dissenting). The Court also did not fully resolve the significance of systematic actual diversion of funds. Whether a government grantor may rely on

- A grant applicant might pressure recipients of government-funded social services to join the faith or participate in religious services, or an applicant may have a history of such behavior.

In future cases, the Court may need to consider whether these or other concerns, individually or in combination, could support the decision of a government grantor to exclude a religious organization, or some or all religious organizations, from a program of public funding. But that difficult question is not presented in this case, in which none of these factors is present. *See Widmar*, 454 U.S. at 275-76 (finding it unnecessary to decide whether Missouri's anti-establishment interests could ever outweigh free-speech interests of religious group).

The only conceivable objection that Missouri has raised, or could have raised, to Trinity Lutheran's grant application is that the playground is owned by a church.[13] That is a far cry from the "historic and substantial state interest" in avoiding funding of religious instruction identified by the Court in *Locke*, 540 U.S. at 725. When the government provides funding for a facially secular purpose, discrimination against an applicant solely because it is a church advances no legitimate anti-establishment concern. *See generally Hunt v. McNair*, 413 U.S. 734, 742 (1973)

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the possibility of diversion to restrict or condition a grant remains an unresolved question.

[13] The State's justification is even weaker if it is not regularly enforced. The State's own website reveals that prior tire-grant recipients include Christian Chapel Academy, the First Baptist Church of Belton, Bourbon Seventh-Day Adventist School, St. Therese Church of the Diocese of Kansas City, and Torah Prep. *See* http://dnr.mo.gov/env/swmp/tires/documents/PriorRecipientsofScrapTireMaterialGrants2014.pdf.

(rejecting "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation"). A funding disqualification in these circumstances serves only to inhibit the church's exercise of its mission and its ability to participate in public life by placing the church at a disadvantage relative to secular organizations. This is a violation of the Free Exercise Clause.

II. MISSOURI'S TIRE-GRANT PROGRAM PROVIDES FUNDING FOR A PURPOSE THAT IS APPARENTLY SECULAR AND LIKELY WOULD NOT BE PERCEIVED BY THE PUBLIC AS ADVANCING THE CHURCH'S RELIGIOUS MISSION.

Whatever the merits of a government's efforts to distinguish between religious and secular organizations when the government distributes funds that will or may be used for religious purposes, such efforts are illegitimate when the purpose of the funding is fundamentally secular and would be understood by the public as secular. Both are true in this case.

A. The Purposes of the Program Are to Dispose of Used Tires and to Enhance the Safety of Children, Including Children Unaffiliated with the Church.

A rubberized playground surface is an unlikely base for a dispute about the reach of the Religion Clauses of the First Amendment. The State's grant program is designed specifically to reduce used-tire waste. *See* Mo. Rev. Stat. § 260.273.6(2). Improved playground surfaces also promote and protect the safety of children using the playgrounds. Both of these goals

are worthy and entirely unconnected with religious matters. And Trinity Luthern has pleaded, and thus it must be accepted as true in the posture of this case, that these benefits flow not only to its members and the students at its daycare facility, but also to other members of the local community. Pet. App. 133a.

The record also reflects that Missouri awards grants under the scrap-tire program on the basis of "neutral, secular criteria that neither favor nor disfavor religion," *Agostini*, 521 U.S. at 231, except for the blanket disqualification of churches. The distribution of funding to a wide variety of applicants "is an important index of secular effect." *Widmar*, 454 U.S. at 274. Even if the State permitted religious institutions to participate in the program, it could not be mistaken for one of the "ingenious plans for channeling state aid" to religious groups that present challenging Establishment Clause issues. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 785 (1973). This is a one-time grant, and while it might be a boon to the church, it is not a means of shifting budgetary responsibility for running a church from the believer to the public treasury.

In short, Missouri's tire-grant program is, in its purpose and its operation, a thoroughly secular matter in both purpose and appearance. The categorial exclusion of churches from the program cannot withstand Free Exercise scrutiny.

B. The Record Does Not Indicate That Trinity Lutheran's Grant Application Presented Fact-Specific Grounds That Might Justify Disqualification of the Church from the Tire-Grant Program.

The distinction between whether a program or activity would *ordinarily* be considered secular and whether the *actual* use of funds by a grant applicant is secular is an important one, particularly in an as-applied challenge. The Court's decision in this case cannot and should not require governments to provide funding to churches or other religious organizations merely because the use of funds, at an abstract level, appears to be secular in nature. A governmental grantor should be permitted to identify unusual or inappropriate uses of funds that, in context, would qualify as religious rather than secular. In other words, particular facts may cause an activity that normally would be considered secular to fall within the play-in-the-joints range, so that the government's anti-establishment concerns have some grounding and might justify a denial of funding. But the Court is not required to delineate the boundaries of that possibility here.

As with the more general line-drawing issue discussed above, the Court need not determine in this case precisely what sorts of facts could cause a generally secular project to be essentially religious and thus justify a denial of government funding. Missouri has not argued or suggested that Trinity Lutheran's playground is in any way unusual, nor that Trinity Lutheran had plans to imbue a state-funded renovation of the playground with religious meaning or messaging. The playground at issue in this case appears to be just a playground, and the State's

decision not to provide funding for it thus appears to be based only on the fact that it is owned by a church.

CONCLUSION

Trinity Lutheran's exclusion from Missouri's tire-grant program cannot be justified on the basis that playground resurfacing generally, nor the resurfacing of Trinity Lutheran's particular playground, advances the religious mission of the church that owns the playground or would be perceived by a reasonable observer as having that effect. The State's disqualification of Trinity Lutheran from the program, solely on the basis that the playground is owned by a church, does not advance a legitimate anti-establishment interest of the State. Placing Trinity Lutheran at a disadvantage relative to other grant applicants merely because it is a church inappropriately hampers the church's free exercise of its religion in violation of the First Amendment.

Respectfully submitted,

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